No. 77-1600

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

GILLRING OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioner, a producer of natural gas in the Texas Gulf Coast area, contends that it is entitled, under a Federal Power Commission order requiring refunds of rates collected in excess of the maximum area rates permitted by the Commission, to reduce its refund obligation by the extent to which rates it collected were below the maximum area rates permitted by the Commission.

1. In 1948 petitioner entered into a gas sales contract with Tennessee Gas Pipeline Company for the sale of natural gas at certain rates fixed by the contract. In 1971 the Commission, in Opinion No. 595,[1] established

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[1] 45 F.P.C. 674; Order on Rehearing, 46 F.P.C. 827.

maximum area rates (or ceiling prices) for the sale of natural gas in interstate commerce from the Texas Gulf Coast area. These rates applied to sales made after August 1, 1971, and also to sales made during the years 1959 to 1971 that had been subject to a possible refund order under Section 4(e) of the Natural Gas Act, 52 Stat. 822, as amended, 15 U.S.C. 717c(e).[2]

With respect to the sales made from 1959 to 1971, the Commission's order in Opinion No. 595 directed, in Paragraph (B), that "all amounts collected under those Section 4(e) rates prior to August 1, 1971 in excess of the applicable area rate shall be subject to refund * * *" (Pet. App. A-4). To facilitate its supervision of the disbursement of refunds, the Commission, in Paragraph (E) of its order, directed producers to file refund reports disclosing among other things (Pet. App. A-4):

> The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate as defined herein subject to the proviso of ordering paragraph (B).

The rates petitioner had collected in some of the years from 1959 to 1971, pursuant to the terms of its 1948 contract, were in excess of the area rate prescribed in Opinion No. 595 for the relevant years, and the rates

[2]Section 4(e) authorizes the Commission, when a new rate schedule is filed by a natural gas company, to order "a hearing concerning the lawfulness of such rate" and to suspend the rate for no more than five months. If the hearing is not concluded at the end of the suspension period, the rate may go into effect, but, at the conclusion of the hearing, the Commission is authorized by Section 4(e) to order the natural gas company to refund "the portion of such increased rates or charges by its decision found not justified."

collected in other years were less than the prescribed rate. Petitioner argued to the Commission that it was entitled, under the terms of Paragraph's (B) and (E) of the Commission's order, to reduce its obligation to refund the rates it had collected in excess of the prescribed rates by the amount by which its other collected rates were less than the prescribed rates.

The Commission rejected that argument in a declaratory order (Pet. App. B). The Commission stated: "Paragraph (B) makes it clear that only amounts collected in excess of the applicable area rates are involved. It says nothing whatever about refund amounts being offset with [the] difference between possible lower-than-area collected rates and area rates" (Pet. App. B-4). The Commission noted (Pet. App. B-4 to B-5) that both the Commission and this Court had rejected the same contention in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 826-827. In those cases the Commission had pointed out that such offsetting, if permitted, would allow a producer "to collect retroactively the area ceiling rate for a period during which it had not placed such higher rate in effect and would be inconsistent with the filed rate doctrine" (see Pet. App. B-4). The Commission here also rejected petitioner's request for discretionary relief on equitable grounds from its refund obligations (Pet. App. B-5 to B-6).

The court of appeals affirmed (Pet. App. A-1 to A-8). It held that the Commission's interpretation of its order was reasonable and was consistent with its prior decisions and regulatory philosophy. The court also sustained the Commission's denial of discretionary relief, noting that such relief would harm consumers and that petitioner was in no different position from other producers (Pet. App. A-6 to A-8).

2. The decision below presents no conflict, no issue of general importance, and is correct. It does not warrant this Court's review.

There is no merit to petitioner's claim (Pet. 6) that the "plain meaning" of Opinion No. 595 entitles it to the claimed offset against its refund obligations. As the Commission stated, Paragraph (B) of the order refers only to amounts collected in excess of area rates, and says nothing about offsets. Moreover, as the court of appeals noted, Opinion No. 595 was based on the well-established principle, reflected throughout Commission rate cases, that an "area rate" is a ceiling rate (Pet. App. A-3, A-5). Producers are generally permitted to file rates that are below the Commission's prescribed area rates, pursuant to their individually bargained contracts, and such lower rates, when filed, become the lawful rate (*ibid.*). See, *e.g.*, *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 768-770; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338. Thus, as the court of appeals correctly noted (Pet. App. A-5):

> The ceiling rate concept is the foundation on which Opinion No. 595 is built. Gillring's interpretation imputes to the Commission an implied intent to relieve Gillring of the 1959-1960 and 1968-1971 contract rates, for which it bargained, just because its return in other years was excessive. In *Permian*, the Supreme Court rejected a variety of offsets imposed on the Commission by the Court of Appeals, which otherwise would have supported Gillring's argument here. *See* 390 U.S. at 826-827, 88 S.Ct. 1344. Surely such a dramatic shift in regulatory philosophy would have been signalled by more than ambiguous language in an ordering paragraph.

Because the Commission reasonably interpreted and explained its own order, in a way consistent with its prior decisions, the court of appeals properly deferred to the Commission's interpretation. *Udall* v. *Tallman*, 380 U.S. 1, 16-18.[3]

Petitioner also appears to reiterate its argument that the Commission should have granted it equitable relief from its refund obligations (Pet. 8-9). That claim was correctly rejected by the Commission and the court of appeals. The Commission's primary responsibility in determining whether to excuse a refund obligation on equitable grounds is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission* (*CATCO*), 360 U.S. 378, 388. As the court of appeals noted, "Gillring's suggestion that consumers would not suffer from the refund offset defies plain arithmetic, ignores the ceiling rate concept, and flaunts [*sic*] the filed rate doctrine" (Pet. App. A-6 to A-7). As the court of appeals held, the Commission did not abuse its discretion in concluding that the balance of the equities favored the consumer.

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[3] For the same reasons, there is no merit to petitioner's claim (Pet. 7) that "the decision below presents questions of general importance regarding the Commission's power to order refunds under the Natural Gas Act." While the Commission is not required by the Act to order refunds in all cases where it might do so, its refusal to permit the kind of offsets sought by petitioner is based on a well established and consistent line of authority. Petitioner cites no authority to the contrary.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Energy Regulatory Commission.

JULY 1978.